

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION TO CHANGE)	
A WATER RIGHT NO. 76N 30001166 BY)	FINAL
THOMAS AND LORELI MOWERY)	ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the February 3, 2004, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application To Change A Water Right 76N 30001166 by Thomas and Loreli Mowery is hereby **DENIED** without prejudice.

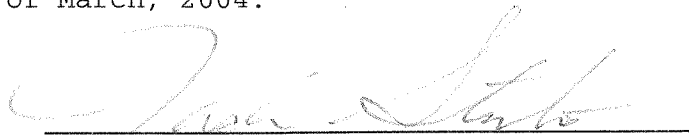
NOTICE

The Department's Final Order may be appealed by a party in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements

with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit only a copy of the tape of the proceedings to the district court.

Dated this 7th day of March, 2004.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 4th day of March, 2004, by First Class United States Mail.

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Catherine Leathers
HEARINGS UNIT
406-444-6615

1 **BEFORE THE DEPARTMENT OF**
2 **NATURAL RESOURCES AND CONSERVATION**
3 **OF THE STATE OF MONTANA**
4 * * * * *

IN THE MATTER OF APPLICATION TO CHANGE A) **PROPOSAL**
 WATER RIGHT NO. 76N 30001166 BY THOMAS) **FOR**
 AND LORELI MOWERY) **DECISION**

5 * * * * *

6 Pursuant to the Montana Water Use Act and to the contested case
7 provisions of the Montana Administrative Procedure Act, and after
8 notice required by Mont. Code Ann. § 85-2-307, a hearing was held on
9 November 19, 2003, in Thompson Falls, Montana, to determine whether an
10 authorization to change Water Right Claim No. 76N 10544100 should be
11 issued to Thomas and Loreli Mowery, hereinafter referred to as
12 "Applicant" for the above applications, under the criteria set forth
13 in Mont. Code Ann. § 85-2-402(2). All water rights involved in the
14 change application were listed in the required public notice.

15 **APPEARANCES**

16 Applicant appeared at the hearing in their own behalf. Tom Mowery
17 testified for the Applicant. Objector Shirley Schultz and Orville
18 Verlanic appeared at the hearing by and through counsel, Claude I.
19 Burlingame. Orville Verlanic testified for this Objector. Objectors
20 Candice Lindsay, Robert Skinner, Muriel Holland, Keith Pilgeram, and
21 Kenneth Eaton (hereafter Lynch Creek Water Users Group) appeared at
22 the hearing by and through counsel, M. Richard Gebhardt. David M.
23 Schmidt, Water Rights Solutions, Inc., Keith Pilgeram, Ken Eaton,
24 Muriel Holland, and Robert Skinner testified for this group of
25 Objectors.

1 **EXHIBITS**

2 Both Applicant and the Lynch Creek Water Users Group of Objectors
3 offered exhibits for the record. The exhibits are admitted into the
4 record to the extent noted below.

5 Applicant offered two exhibits for the record. The Hearing
6 Examiner accepted and admitted into evidence Applicant's Exhibits 1-2.
7 Applicant had no other exhibits.

8 **Applicant's Exhibit A1** consists of a three-page document entitled
9 *Opening Statement Water Hearing 11/19/03* with two one-page letters
10 attached.

11 **Applicant's Exhibit A2** is a one-page map.

12 Objector Lynch Creek Water Users Group offered five exhibits for
13 the record. The Hearing Examiner accepted and admitted into evidence
14 Objector Lynch Creek Water Users Group Exhibits 01-04.

15 **Objector's Exhibit 01** is report entitled *Application To Change A*
16 *Water Right 76N 30001199*, [sic] *Water Rights Analysis* consisting of
17 twenty-two pages.

18 **Objector's Exhibit 02** is a three-page letter to Keith Pilgeram.

19 **Objector's Exhibit 03** is a one page map with additions by David
20 M. Schmidt.

21 **Objector's Exhibit 04** an 11" x 17" map with orange highlighter
22 additions which are labeled with notes stapled to the map.

23 **Objector's Exhibit 05** was offered but not admitted into evidence
24 by the Hearing Examiner. Applicant had questions for the author of the
25 document. The author was not made available for cross-examination and

1 therefore, the exhibit was not admitted for the reasons noted in
2 Conclusion of Law No. 3 below.

3
4 **PRELIMINARY MATTERS**

5 Counsel for Objectors requested the opportunity to brief the
6 issue of historical use in relation to changes to water rights. The
7 deadline for filing joint briefs by Objectors' counsel to the Hearing
8 Examiner was by postmark on or before December 1, 2003, with a copy
9 sent to the Applicant. Applicant had the opportunity to submit a reply
10 brief postmarked on or before December 10, 2003. The Hearing Examiner
11 received a timely joint brief from Objectors' counsel, and a timely
12 response from Applicant.

13 The Hearing Examiner hereby notifies the Parties that Judicial
14 Notice of the Department water right record of Claim No. 76N 10544100
15 is taken. See Conclusion of Law No. 3 below. The Hearing Examiner was
16 searching for documentation of any formal apportionment of the water
17 right among the purchasers of the water right being changed in the
18 instant application to see how or if carriage water had been
19 addressed.

20 The Hearing Examiner, having reviewed the record in this matter
21 and being fully advised in the premises, does hereby make the
22 following:

FINDINGS OF FACT

General

1. Application To Change A Water Right 76N 30001166 in the name of and signed by Thomas E. and Loreli J. Mowery was filed with the Department on February 14, 2002. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department file)

3. Applicant purchased land with an appurtenant irrigation water right claim No. 76N 10544100. The full amount of water listed on the claimed historical right is 5 cubic feet per second (cfs), up to 600 acre-feet per year. This water right is now shared by multiple owners who also purchased land over time to which the water right is appurtenant. Applicant states their share of this water right is 2.5 cfs up to 300 acre-feet for use on 93 acres of irrigation. The point of diversion for this water right and a conveyance ditch, Benedick Ditch, are shared by the co-owners of the water right. The Applicant's place of use is at the end of the 1.1 mile ditch. Not all owners currently use their portion of the water right. The water right has not been formally apportioned among the co-owners of the water right in the Department water right records by the Montana Water Court in the statewide water adjudication. The Department Water Right records appears to apportion the historical water right according to the ratio of historically irrigated acres purchased to the total historically irrigated acres without mention of carriage water in Benedick Ditch.

1 The instant Application pertains only to Applicant's portion of this
2 shared water right and does not involve salvaged water. (Department
3 file, Department Water Right Record No. 76N 10544100, testimony of Tom
4 Mowery, David Schmidt)

5 4. Although the public notice of the Application states the
6 Applicant proposes to add a point of diversion, Applicant actually
7 seeks to replace the point of diversion for one cfs up to 300 acre-
8 feet **of Applicant's portion** of the water right. The public notice did
9 not make it clear that Applicant's intent was to move the point of
10 diversion for only *their* share of the water right and leave the
11 existing point of diversion for the remaining co-owners of the water
12 right. Thus, Applicant intends to add a second point of diversion to
13 what historically existed by moving the point of diversion for their
14 portion of the water right to a downstream location. Applicant
15 proposes to move the point of diversion of their portion from the
16 existing headgate on East Fork Clark Creek in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section
17 25, downstream to a new pump site on Lynch Creek in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ in
18 Section 36, all in Township 21 North, Range 26 West, Sanders County,
19 Montana. The place of use will remain 93 acres in the SW $\frac{1}{4}$ of Section
20 36, Township 21 North, Range 26 West, Sanders County, Montana.

21 (Department file, testimony of Tom Mowery)

22 Historic Water Use

23 5. Applicant historically has turned water into the Benedick Ditch
24 to irrigate about 35 acres of hay and when water was available to
25 irrigate an additional 20 acres of pasture. The Benedick Ditch

1 capacity has been measured in the ditch downstream of the diversion
2 headgate at 5.94 cfs. Applicant diverts 5 cfs into the ditch from the
3 East Fork of Clark Creek. Applicant typically begins diverting water
4 from East Fork Clark Creek into Benedick Ditch in early April and
5 water is available at Applicant's place of use in May and June.
6 Applicant has historically been limited to one ¼ mile sprinkler hand-
7 line running for two months. Applicant estimates that the flow that
8 reaches their place of use is equal to 28 sprinkler heads running at 6
9 gallons per minute (gpm) per head, or 168 gpm¹. This flow, 168 gpm,
10 running for 60 days, is about 45 acre-feet² of water applied to the
11 crop. After early July, flows in the East Fork of Clark Creek decrease
12 such that water in Benedick Ditch no longer reaches Applicant's place
13 of use at the end of Benedick Ditch. Then, except for special
14 circumstances, e.g., a land owner along the ditch needing stock water,
15 water is no longer diverted by Applicant into Benedick Ditch after
16 early July and is then available to downstream users. (Department
17 file, Exhibit A1, testimony of Tom Mowery, David Schmidt)

18 **Adverse Effect**

19 6. The historical water right is now owned by multiple parties along
20 Benedick Ditch. Applicant contends that they are the only co-owners of
21 the water right and conveyance ditch easement that are actively
22 interested in use of the water right. Although no co-owners of the
23 water right or ditch easement formally objected to the instant

¹ 28 heads * 6 gpm/head = 168 gpm

² (168 gpm * 1440 minutes/day * 60 days)/325851 gal/af ≈ 45 af

1 Application, no evidence was provided that the co-owners no longer
2 intend to use their portion of the water right or their portion of the
3 Benedick Ditch easement in the future. The special circumstances
4 Applicant referred to include providing stock water to a person living
5 along Benedick Ditch that apparently does not own a water right for
6 stock water. (Department file, testimony of Tom Mowery, David Schmidt)
7 7. The Benedick Ditch requires substantial carriage flows to convey
8 water through the ditch to the Applicant's place of actual use.
9 Applicant diverts water at 5 cfs at the headgate and has to let water
10 flow more than four weeks before water arrives at their place of use
11 at the end of the Benedick Ditch. Other than Applicant referring to
12 their 2.5 cfs portion as "my water", no evidence of how the carriage
13 flows and irrigation flows of the water right were apportioned among
14 the water right co-owners was provided. The evidence shows Applicant
15 is the only current user of Benedick Ditch, yet Applicant diverts a
16 full 5 cfs at the headgate into the ditch instead of the 2.5 cfs they
17 contend is their portion. Applicant does not know what the effects of
18 removing their entire (2.5 cfs) portion of the water right from
19 Benedick Ditch will have on the remaining owners of the water right.
20 The record does not explain how the co-owners of the water will be
21 able to continue to exercise their portion of the water right through
22 the Benedick Ditch, should they choose to, under the changed
23 conditions proposed by the Applicant. (Testimony of Tom Mowery, David
24 Schmidt, Exhibit A1)

1 8. Applicant believes their portion of the historic water right
2 flows is 2.5 cfs, up to 300 acre-feet per year in volume. Applicant
3 believes there will be no adverse effect to downstream users because
4 they intend to only divert 1 cfs at the proposed point of diversion
5 and leave the remainder, 1.5 cfs, to flow downstream. The undiverted
6 1.5 cfs portion is being considered for lease to Montana Department of
7 Fish, Wildlife, and Parks (DFWP) for instream use. There are water
8 rights of record on Lynch Creek downstream of Applicant's proposed
9 point of diversion. If the 1.5 cfs not used by Applicant is leased by
10 DFWP, it cannot also be available for diversion by downstream
11 appropriators on Lynch Creek, and no evidence, other than theoretical
12 assertions, was submitted regarding lack of adverse effect to their
13 uses. (Department file, testimony of Tom Mowery, David Schmidt)

14 9. Applicant proposes to divert 1 cfs between April 1 and October 31
15 of each year at the proposed point of diversion and to use it on 93
16 acres that are listed on the water right as "irrigated". Applicant has
17 historically irrigated 35 acres of hay ground, and when water was
18 available, an additional 20 acres of pasture ground. At the proposed
19 point of diversion the water would be diverted during time periods
20 when water historically was not being diverted and reaching
21 Applicant's place of use because the seepage from Benedick Ditch was
22 so great it prevented the water from reaching Applicant's place of use
23 at the end of the Ditch. In the past when water ceased reaching the
24 place of use, Applicant would stop diversion and the water was allowed
25 to flow downstream to other appropriators. Under the proposed change,

1 during the time Applicant has historically had water at the Benedick
2 Ditch headgate, but not had water at the place of use, and had stopped
3 diverting because of this, this water would now be diverted by
4 Applicant's new point of diversion and no longer flow downstream as it
5 has in the past. The use at the proposed point of diversion would take
6 water at times it has not been diverted in the past and apply it to 38
7 more acres³ than have been historically irrigated. Applicant has not
8 irrigated their land in October. This new use at a time beyond the
9 historic use, as well as the increased use, would be an adverse effect
10 on downstream appropriators. (Testimony of Tom Mowery, Orville
11 Verlanic, Ken Eaton, Muriel Holland, Robert Skinner)

12 **Adequacy of Appropriation Works**

13 10. Applicant has worked with the Natural Resources and Conservation
14 Service (NRCS) regarding the design of the proposed pump diversion
15 works. Applicant will install a flow meter at the proposed pump. It is
16 common knowledge that Natural Resources and Conservation Service is
17 experienced in the design of diversion works. The proposed diversion
18 works are two single phase 10 horsepower (hp) pumps on Lynch Creek
19 with a combined maximum output up to 448.8 gpm. The proposed
20 appropriation works is adequate. (Department file, testimony of Tom
21 Mowery)

22 **Beneficial Use**

23 11. Applicant has proven the proposed irrigation use of water is a
24 beneficial use of water. The water is used to produce hay and pasture

³ 93 (proposed) - 55 (historic) = 38 additional after change

1 for Applicant's cattle operation. (Department file, testimony of Tom
2 Mowery)

3 12. The Department notes that the 300 acre-foot irrigation volume
4 requested is higher than NRCS guidelines because of the gravelly
5 porous soil in the area. This statement by the NRCS was made for the
6 proposed 93 acres of irrigation. The 448.8 gpm up to 300 acre-feet is
7 reasonable for the proposed use when evaluated based on irrigating the
8 proposed 93 acres. The record is not clear if 300 acre-feet is a
9 reasonable volume for the 55 historically irrigated acres at the
10 proposed point of diversion, and the water is piped from the proposed
11 point of diversion on Lynch Creek. (Department file, Finding of Fact
12 No. 5 above)

13 **Possessory Interest**

14 13. Applicant has a possessory interest, or the written consent of
15 the person with the possessory interest, in the property where the
16 water is to be put to beneficial use. (Department file)

17 **Water Quality Issues**

18 14. No valid objections relative to water quality were filed against
19 this application nor were there any objections relative to the ability
20 of a discharge permit holder to satisfy effluent limitations of his
21 permit

22 Based upon the foregoing Findings of Fact and upon the record in
23 this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

- 1
- 2 1. The Department has jurisdiction to approve a change in
- 3 appropriation right if the appropriator proves the criteria in Mont.
- 4 Code Ann. § 85-2-402.
- 5 2. The Department shall approve a change in appropriation right if
- 6 the appropriator proves by a preponderance of evidence the proposed
- 7 change in appropriation right will not adversely affect the use of the
- 8 existing water rights of other persons or other perfected or planned
- 9 uses or developments for which a permit or certificate has been issued
- 10 or for which a state water reservation has been issued; except for a
- 11 lease authorization pursuant to Mont. Code Ann. § 85-2-436, a
- 12 temporary change authorization for instream use to benefit the fishery
- 13 resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant
- 14 to Mont. Code Ann. § 85-2-439 when authorization does not require
- 15 appropriation works, the proposed means of diversion, construction and
- 16 operation of the appropriation works are adequate; the proposed use of
- 17 water is a beneficial use; except for a lease authorization pursuant
- 18 to Mont. Code Ann. § 85-2-436 or a temporary change authorization
- 19 pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439
- 20 for instream flow to benefit the fishery resource, the applicant has a
- 21 possessory interest, or the written consent of the person with the
- 22 possessory interest, in the property where the water is to be put to
- 23 beneficial use; if the change in appropriation right involves salvaged
- 24 water, the proposed water-saving methods will salvage at least the
- 25 amount of water asserted by the applicant; and, if raised in a valid

objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

3. The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other*

1 persons or other perfected or planned uses or developments for
2 which a permit or certificate has been issued or for which a
3 state water reservation has been issued under part 3.

4

5 (13) A change in appropriation right contrary to the
6 provisions of this section is invalid. An officer, agent, agency,
7 or employee of the state may not knowingly permit, aid, or assist
8 in any manner an unauthorized change in appropriation right. A
9 person or corporation may not, directly or indirectly, personally
10 or through an agent, officer, or employee, attempt to change an
11 appropriation right except in accordance with this section
12

13 (italics added).
14

15 Montana's change statute simply codifies western water law.⁴ One
16 commentator describes the general requirements in change proceedings
17 as follows:

18 Perhaps the most common issue in a reallocation dispute is
19 whether other appropriators, especially junior appropriators,
20 will be injured because of an increase in the consumptive use of
21 water. Consumptive use may be defined as "diversions less
22 returns, the difference being the amount of water physically
23 removed (depleted) from the stream system through
24 evapotranspiration by irrigated crops or consumed by industrial
25 processes, manufacturing, power generation or municipal use." An
26 appropriator may not increase, through reallocation [changes] or
27 otherwise, the historic *consumptive* use of water to the injury of
28 other appropriators. *In general, any act that increases the*
29 *quantity of water taken from and not returned to the source of*
30 *supply constitutes an increase in historic consumptive use.* As a
31 limitation on the right of reallocation, historic consumptive use
32 is an application of the principle that appropriators have a

⁴ Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change ... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

1 vested right to the continuation of stream conditions as they
2 existed at the time of their initial appropriations.

3
4 Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78
5 (italics added).
6

7 In Pueblo West Metropolitan District v. Southeastern Colorado
8 Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

9 [O]nce an appropriator exercises his or her privilege to change a
10 water right ... the appropriator runs a real risk of
11 *requantification of the water right based on actual historical*
12 *consumptive use*. In such a change proceeding a junior water
13 right ... which had been strictly administered throughout its
14 existence would, in all probability, be reduced to a lesser
15 quantity because of the relatively limited actual historic use of
16 the right.

17
18 (italics added).
19

20 See also 1 Wells A. Hutchins, Water Rights and Laws in the
21 Nineteen Western States, at 624 (1971) (changes in exercise of
22 appropriative rights do not contemplate or countenance any increase in
23 the quantity of water diverted under the original exercise of the
24 right; in no event would an increase in the appropriated water supply
25 be authorized by virtue of a change in point of diversion, place of
26 use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights
27 and Water Resources, at § 5.17[5] (1988) (*a water holder can only*
28 *transfer the amount that he has historically put to beneficial use and*
29 *consumed* - the increment diverted but not consumed must be left in the
30 stream to protect junior appropriators); Robert E. Beck, 2 Water and
31 Water Rights at § 16.02(b) at 271 ("The issues of waste and historic
32 use, as well as misuse, nonuse, and abandonment, may be properly be
33 considered by the administrative official or water court when acting

1 on a reallocation application," citing Basin Elec. Power Coop. v.
2 State Board of Control, 578 P.2d 557, 564 (Wyo. 1978)); Colo. Rev.
3 Stat. § 37-92-301(5) (in proceedings for a reallocation, it is
4 appropriate to consider abandonment of the water right).

5 The requirements of Montana's change statute have been litigated
6 and upheld in In re Application for Change of Appropriation of Water
7 Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991) (applicant for
8 a change of appropriation has the burden of proof at all stages before
9 the Department and courts, and the applicant failed to meet the burden
10 of proving that the change would not adversely affect objectors'
11 rights; the application was properly denied because the evidence in
12 the record did not sustain a conclusion of no adverse effect and
13 because it could not be concluded from the record that the means of
14 diversion and operation were adequate).

15 Prior to the enactment of the Water Use Act in 1973 and the
16 promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a
17 change lawsuit was on the person claiming the change adversely
18 affected their water right, although the law was the same in that an
19 adverse effect to another appropriator was not allowed. Holmstrom
20 Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605
21 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060
22 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063
23 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963
24 (1974) (plaintiff could not change his diversion to a point upstream of
25 the defendants because of the injury resulting to the defendants);

1 McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator
2 was entitled to move his point of diversion downstream, so long as he
3 installed measuring devices to ensure that he took no more than would
4 have been available at his original point of diversion); Head v. Hale,
5 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of
6 water appropriated for placer mining purposes cannot so change its use
7 as to deprive lower appropriators of their rights, already acquired,
8 in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont.
9 216, 44 P. 959 (1896) (after the defendant used his water right for
10 placer mining purposes the water was turned into a gulch, whereupon
11 the plaintiff appropriated it for irrigation purposes; the defendant
12 then changed the place of use of his water right, resulting in the
13 water no longer being returned to the gulch - such change in use was
14 unlawful because it absolutely deprived the plaintiff of his
15 subsequent right).

16 The DNRC in administrative rulings has held that a water right in
17 a change proceeding is defined by actual beneficial use, not the
18 amount claimed or even decreed. In the Matter of Application for
19 Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer,
20 December 13, 1991, Final Order ; In the Matter of Application for
21 Change Authorization No. G(W)008323-g76L by Starkel/Koester, April 1,
22 1992, Final Order.

23 In a change proceeding, the *consumptive* use of the historical
24 right has to be determined:
25

1 In a reallocation proceeding, both the actual historic
2 consumptive use and the expected consumptive use resulting from
3 the reallocation are estimated. Such estimates are usually made
4 by civil engineers. With respect to a reallocation, the engineer
5 conducts an investigation to determine the historic diversions
6 and the historic consumptive use of the water subject to
7 reallocation. This investigation involves an examination of
8 historic use over a period that may range from ten years to
9 several decades, depending on the value of the water right being
10 reallocated.

11

12 Expected consumptive use may not exceed historic consumptive use
13 if, as would typically be the case, junior appropriators would be
14 harmed. If an increase in consumptive use is expected, the
15 quantity or flow of reallocated water is decreased so that
16 consumptive use is not increased.

17
18 2 Water and Water Rights at § 16.02(b) at 279-80.
19

20 Here, Applicant has shown a period of diversion from early April
21 until water ceases to reach their place of use at the end of the
22 Benedick Ditch around the first of July depending upon the water flows
23 in the source. Applicant has never irrigated in October. The evidence
24 is that Applicant diverted 5 cfs at the headgate in order to apply 168
25 gpm up to 45 acre-feet per year to 55 acres. The record is not clear
26 on whether Applicant historically diverted 5 cfs or 2.5 cfs at the
27 headgate⁵ to obtain their portion of the claimed water right, or what
28 portion of the water diverted is carriage water. Applicant did not
29 provide evidence that existing co-owners of the original water right
30 would not use the carriage flow portion of the 5 cfs diverted by
31 Applicant to carry their water down Benedick Ditch or that these water
32 right holders will not be adversely effected. The Hearing Examiner
33 hereby notifies the Parties that Judicial Notice of the Department

⁵ Exhibit A1 indicates 5 cfs is diverted while Applicant testimony is their right is 2.5 cfs and no other appropriators use Benedick Ditch.

1 water right record of Claim No. 76N 10544100 is taken. See Mont.
2 Admin. R. 36.12.221(4). The Hearing Examiner was searching for
3 documentation of any formal apportionment of the water right among the
4 purchasers of the water right being changed in the instant application
5 to see how or if carriage water had been addressed. The Hearing
6 Examiner found no information on carriage water, but found that 12
7 water right transfer forms had been filed and the acknowledgement of
8 each transfer stated "[T]ransfer processed to add new owners. The
9 water right will be split into separate ownerships after final
10 decree." Objector's Exhibit 05 was offered on the position of other
11 owners along Benedick Ditch, but was not admitted into evidence by the
12 Hearing Examiner. Applicant had questions for the author of the
13 document. The author should have been available for cross-examination
14 by other parties or questioning by the Hearing Examiner, but was not.
15 Therefore, the exhibit was not admitted. See In The Matter Of 41H-
16 11548700 by PC Development, Final Order, (2003). If the other co-
17 owners did continue to divert the 5 cfs at the Benedick Ditch
18 headgate, the 1 cfs taken by the Applicant at the proposed point of
19 diversion would be in addition to the historic amount and would
20 adversely effect downstream appropriators on Lynch Creek. In addition,
21 the evidence does not show how much water left in the stream at the
22 present point of diversion will actually make it to the proposed point
23 of diversion. Applicant theorizes that if they do not divert 2.5 cfs
24 at Benedick Ditch, and instead take 1 cfs at the proposed point of
25 diversion, then 1.5 cfs would be available to mitigate any impacts to

1 existing appropriators downstream of the proposed point of diversion.
2 However, Applicant has not shown how much of the 2.5 cfs would arrive
3 at the proposed pump site. In addition, if the 1.5 cfs difference is
4 leased to DFWP, as proposed by the Applicant, it is not available for
5 mitigation of impacts to existing appropriators because they will not
6 be able to appropriate it. See Mont. Code Ann. § 85-2-408. Applicant
7 also argues that downstream appropriators are not on the same named
8 source in the Department records. The fact that downstream water
9 rights are not in the Department records with the same source name
10 does not mean a downstream senior cannot call upstream tributaries.
11 See Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34
12 Mont. 135, 85 P. 880, 882 (1906). In addition, diversion at the
13 proposed point of diversion outside the historic time-frame would take
14 water existing appropriators have come to rely on. "While there is no
15 fixed rule for determining whether a change in point of diversion
16 will injure others, and each case depends largely on its own
17 surrounding circumstances and conditions, there can generally be
18 no change in point of diversion which will result in an enlarged
19 use either as to amount or time." See Van Tassel Real Estate &
20 Live Stock Co. v. City of Cheyenne, 54 P.2d 906, 910 (Wyo. 1936).
21 Applicant's proposal will use water outside the historic period of
22 diversion, use water not shown will actually arrive at the new point
23 of diversion, and will apply water to lands not historically irrigated
24 even though they were claimed in the statewide water adjudication.
25 Applicant has not proven by a preponderance of evidence that the use

1 of existing water rights of other persons on the Benedick Ditch nor
2 existing appropriators downstream of the current point of diversion
3 would not be adversely affected. Mont. Code Ann. § 85-2-402(2)(a). See
4 Finding of Fact Nos. 3, 5, 6, 7, 8, 9.

5 4. The Applicant has proven by a preponderance of evidence that the
6 proposed means of diversion, construction, and operation of the
7 appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).
8 See Finding of Fact No. 10.

9 5. The Applicant has not proven by a preponderance of evidence that
10 the quantity of water proposed to be used is the reasonable amount, or
11 the minimum amount, necessary for the proposed beneficial use. The
12 Department analysis of flow and volume was made on the Applicant's
13 portion of the claimed acreage (93) instead of the historic acres
14 irrigated (55) on Applicant's land. Also, a portion of the historic
15 volume diverted was used for ditch loss which would not occur under
16 the proposal. Why this volume is still needed under the proposal is
17 not understood. Mont. Code Ann. § 85-2-402(2)(c). See Finding of Fact
18 Nos. 5, 12.

19 6. The Applicant has not proven by a preponderance of evidence the
20 proposed use of water is a beneficial use of water. Continued
21 irrigation of Applicant's place of use will be a benefit to the
22 Applicant, however, it is not clear that the amounts requested do not
23 exceed what is necessary to irrigate the 55 acres historically
24 irrigated. Diversion of water to anything but a beneficial use is a
25 waste of water. Mont. Code Ann. §§ 85-2-102(2)(a), 102(19). Mont.

1 Code Ann. § 85-2-402(2)(c). See Finding of Fact No. 11 and Conclusion
2 of Law No. 5 above.

3 7. The Applicant has proven by a preponderance of evidence a
4 possessory interest in the property where water is to be put to
5 beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See, Finding of Fact
6 No. 13.

7 8. The application does not involve salvaged water. Mont. Code Ann.
8 § 85-2-402(2)(e). See Finding of Fact No. 3.

9 9. No objection was raised as to the issue of water quality of a
10 prior appropriator being adversely affected, or as to the ability of a
11 discharge permit holder to satisfy effluent limitation of a permit.
12 Mont. Code Ann. §§ 85-2-402(2)(f), (g). See, Finding of Fact No. 14.

13 10. The Department cannot grant an authorization to change a water
14 right unless the Applicant proves all of the Mont. Code Ann. § 85-2-
15 402 criteria by a preponderance of the evidence. Applicant has not met
16 the criteria for issuance of an authorization to change an
17 appropriation water right. See Conclusion of Law Nos. 3, 5. Mont.
18 Code Ann. §§ 85-2-402(2), (8).

19 **WHEREFORE**, based upon the foregoing Findings of Fact and
20 Conclusions of Law, the Hearing Examiner makes the following:

21 **PROPOSED ORDER**

22 Application To Change A Water Right 76N 30001166 is hereby **DENIED**
23 without prejudice.

1 NOTICE

2 This Proposal for Decision may be adopted as the Department's
3 final decision unless timely exceptions are filed as described below.
4 Any party adversely affected by this Proposal for Decision may file
5 exceptions and a supporting brief with the Hearing Examiner and
6 request oral argument. Exceptions and briefs, and requests for oral
7 argument must be filed with the Department by February 23, 2004, or
8 postmarked by the same date, and copies mailed by that same date to
9 all parties.

10 Parties may file responses and response briefs to any exception
11 filed by another party. The responses and response briefs must be
12 filed with the Department by March 15, 2004, or postmarked by the same
13 date, and copies must be mailed by that same date to all parties. No
14 new evidence will be considered.

15 No final decision shall be made until after the expiration of the
16 above time periods, and due consideration of *timely* oral argument
17 requests, exceptions, responses, and briefs.

18 Dated this 3rd day of February, 2004.
19
20

21 

22 Charles F Brasen
23 Hearings Officer
24 Water Resources Division
25 Department of Natural Resources
26 and Conservation
27 PO Box 201601
28 Helena, Montana 59620-1601
29

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR
DECISION was served upon all parties listed below on this 3rd
day of February, 2004, by First Class United States Mail.

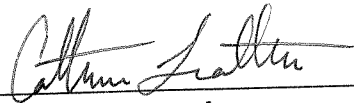
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